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No. 90-1947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners

v.

THE CITY OF ESCONDIDO,
Respondent

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether the Court of Appeal was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance did not constitute a taking without just compensation even though it restricts a mobile home park operator's ability to increase space rent whenever a mobile home is transferred from one homeowner to another.

(2) Whether the Escondido Ordinance substantially advances a legitimate state purpose and does not deny mobile home park operators economically viable use of their land even though it restricts a park operator's ability to increase space rent whenever a mobile home is transferred from one homeowner to another.

(3) Whether the Court of Appeal was correct in ruling that the Escondido Ordinance is not a violation of federal substantive due process even though it restricts a park operator's ability to increase space rent whenever a mobile home is transferred from one homeowner to another.

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BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Association of Retired Persons ("AARP") is a not-for-profit membership organization of 33 million persons, age 50 and over. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose; (c) lead in determining the role and place of older persons in society; and (d) sponsor research on physical, psychological, social, economic and other aspects of aging. AARP meets its members' diverse needs by providing a range of services including educational programs, informative publications, opportunities for volunteer service, special member bene-

fits, as well as representation of the concerns of older Americans before legislative, administrative and, where appropriate, judicial bodies.

Mobile homes are a major source of housing for older Americans. More than one million older Americans (age 65 and over) are residents of mobile home parks.[1] In California, 72% of mobile home residents are age 55 or older,[2] and the majority of residents of the mobile home parks in this case are older persons.

AARP stands as a representative of these older citizens, many of whom have limited financial resources.[3] For them, mobile homes are one of the few remaining sources of affordable home ownership. Moreover, many older residents of mobile home parks are very old,[4] and live alone.[5] The mobile home constitutes their only significant accumulated asset. A severe shortage of rental sites in many communities, combined with the immobility of "mobile homes",[6] gives park operators extraordinary leverage to exact large increases in rent and other fees. The combination of limited resources and increased medical costs associated with aging places older mobile home park residents in a particularly vulnerable position.

States and localities have recognized the unique nature of the mobile home tenancy and have enacted laws and ordinances, like the one at issue in this case, that strike the proper balance between the interests of mobile home owners and those of mobile home park operators. Courts have long upheld rent control as a reasonable means of protecting tenants and of ensuring an adequate stock of affordable housing. AARP strongly supports the authority of states and localities to enact rent control laws and ordinances, authority which is being challenged in this case. The Association submits this brief *amicus curiae*, with the consent of the parties,[7] urging this Court to affirm the decision of the California Court of Appeal.

[1] U.S. Department of Commerce and U.S. Department of Housing and Urban Development, *American Housing Survey for the United States in 1989* 326, Table 7.9 (1991). This survey defines "elderly householder" as age 65 or older. It also collects information on all mobile homes, whether they are situated in mobile home parks or on land owned by the homeowner.

The percentage of older persons who are new buyers of mobile homes continues to increase. The percentage of new buyers age 60 and over increased from 15 to 19 percent between 1984 and 1987. American Association of Retired Persons, *Manufactured Housing Park Tenants: Shifting the Balance of Power* i (1991).

[2] California Department of Housing and Community Development. *Mobile Home Parks in California—A Survey of Mobile Home Park Owners Pursuant to S.B. 1835* (Craven; Chapter 580, Statutes of 1984) 1, 30, Table 15 (1986).

[3] The most recent American Housing Survey indicates that 43% of older residents of mobile homes have annual incomes below $10,000, and nearly 80% have annual incomes below $20,000, *1989 American Housing Survey, supra* note 1, at 334, Table 7-12.

[4] Approximately 40% of older residents of mobile homes are age 75 and older. *1989 American Housing Survey, supra* note 1, at 326, Table 7.9.

[5] Nearly half (46%) of the older residents of mobile homes live alone, and most of these residents are widows. *Id.*

STATEMENT OF THE CASE

AARP adopts the respondent's statement.

[6] As discussed *infra* note 17 and accompanying text, mobile homes are rarely "mobile" today, given the high cost of moving them, the potential for damage, and the limited number of available mobile home "pads." As is true for other types of housing, the length of tenure for older residents of mobile homes is longer than that for younger residents. According to the 1989 Housing Survey, nearly half (49%) of older mobile home residents moved into their homes before 1980, compared to 26% of younger residents (under 65 years of age). *1989 American Housing, supra* note 1, at 328 (Table 7-9) and 52 (Table 2-9).

[7] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Under all applicable standards, the Escondido Rent Control Ordinance does not violate any rights of the petitioners under the Fifth and Fourteenth Amendments of the Constitution. The California Court of Appeal was correct in holding that the "per-se taking" standard established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is not applicable to this case. First, the interests that allegedly are being "taken" by operation of the Ordinance are not recognized by law as "property rights." Second, any restrictions on mobile home operators' property rights result from operation of the state mobile home law and not the local Ordinance. Moreover, the limitations on the landlord's ability to terminate a mobile home tenancy resulting from the California Mobilehome Residency Law are constitutionally permissible. Third, the Escondido Ordinance, and the state law, do not compel the petitioners to acquiesce to the "permanent physical occupation" required by the *Loretto* standard.

Since this case challenges the constitutionality of rent control, which is a form of economic regulation, the "multifactor inquiry" established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), is the appropriate standard to apply in a takings analysis. The Escondido Ordinance does not result in a taking requiring just compensation under the *Penn Central* standard because the character of the governmental action in this case, and the significance of the problems it reasonably attempts to address, clearly outweigh any economic impact on the petitioners. The public purpose behind the Escondido Ordinance—to protect mobile home tenants—has consistently been recognized as legitimate. Moreover, there is a rational relationship between this purpose and the Escondido Ordinance, which attempts to more fairly balance the interests of landlords and tenants in the mobile home market. At the same time, any economic

impact on the petitioners is not the "drastic" diminution in value required by courts to find a taking under this standard.

If this Court chooses to apply a stricter standard in its takings analysis, then AARP maintains that the Escondido Ordinance "substantially advances a legitimate government interest" and, at the same time, does not deny mobile home park operators "economically viable" use of their property. The Ordinance not only protects subsequent tenants from exorbitant rents, but also clearly protects current tenants from the significant loss in the value of their mobile homes that would result from such rent increases. Moreover, the vacancy control provision, which is being challenged in this case, can be considered as a type of eviction protection, by eliminating the incentive of park operators to pressure existing tenants to move so that they can raise rents. Clearly, all of these interests are "substantially advanced" by the Escondido Ordinance. At the same time, the petitioners are still able to rent their property and receive income from it; their use of the property remains economically viable.

Finally, the Escondido Ordinance does not violate the substantive due process rights of mobile home park operators. Legislation survives a due process challenge if the Court finds that the legislature reasonably could have concluded that its action would promote a legitimate state interest. The fundamental question in a substantive due process analysis of the Ordinance is not the wisdom of it, but rather, its reasonableness, which is clearly evident in this case.

ARGUMENT

I. THE LOWER COURT WAS CORRECT IN HOLDING THAT THE ESCONDIDO ORDINANCE DOES NOT CONSTITUTE A TAKING OF THE PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION

The Association will rely on the respondent and other *amici* to more fully argue that the California Court of Appeal was correct in rejecting the application of the standard established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) to this case. This *amicus* brief addresses this argument in a general manner, and only highlights a number of relevant points that the Court should consider in its deliberations. This brief focuses primarily on the important public purpose behind the Escondido Ordinance, as explained in the context of the takings analysis established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

A. The Escondido Ordinance Does Not Result In A Taking By Permanent Physical Occupation And Thus Does Not Fall Within The Standard Adopted In *Loretto v. Manhattan Teleprompter*

The petitioners' argue that, because the Escondido Ordinance resulted in a "permanent physical occupation" of their mobile home park sites by mobile home owners not of their choosing, it constitutes a "per-se taking" under the *Loretto* standard.

The court below was correct in refusing to apply the *Loretto* standard to this case. The Escondido Ordinance merely regulates the economic relations of landlords and tenants, and, as this Court has consistently stated, such statutes (as well as ordinance) are not "*per se* takings." *Pennell v. City of San Jose*, 458 U.S. 1, 12, n.6 (1988).

The *Loretto* standard is not applicable to this case for a number of reasons. First, the interests that allegedly are being "taken" by operation of the Escondido Ordinance are not property rights recognized by law. In *Loretto* and subsequent decisions, this Court has emphasized that a taking will be found under *Loretto* only where recognized property rights—"treasured strands in an owner's bundle of property rights"—are involved. *Loretto v. Teleprompter*, 458 U.S. at 435.

The petitioners argue that the Escondido Ordinance, "either standing alone or in combination with" the California Mobilehome Residency Law, transfers valuable rights from park operators to homeowners. However, the impact of the state law must be separated from that of the Ordinance in order to properly analyze the petitioners' takings argument. When one untangles the bundle of five rights that the petitioners claim are being "taken" by operation of the Ordinance,[8] one can clearly see that the only two "rights" that are affected by the Ordinance are in fact not recognized by law as "property rights."

These rights—the right to "pay rent below market in perpetuity" (right #2) and the right "to fix the successor tenant's effective rent by charging a premium on the sale of the mobilehome coach" (right #4)—are not "sufficienty bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes." *Penn Central v. New York*, 438 U.S. at 125. The "right" to collect a certain rent and the "right" to receive any "premium" on the sale of a mobile home clearly are not included in "the group of rights inhering in a citizen's relation to the physical thing." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

The petitioners in this case have no property interest in any "additional rents" that could be collected in the absence of the Ordinance. Nor is the "premium" resulting from the sale of the mobilehome in their rent-controlled park—the "site value"—a discrete property interest belonging to the park operator.[9]

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[8] *See* Brief for Petitioners at 6.

[9] The court below correctly suggested that the "sales premium," rather than representing the "value" of an interest transferred by

Second, the remaining rights outlined by petitioners—the right to "occupy the mobilehome space in perpetuity" (right #1); the right to "select the next tenant to occupy the property" (right #3); and the right to "sell, bequeath, or pass by intestacy all of these rights" (right #5)—are all affected not by the Escondido Ordinance, but by the California Mobilehome Residency Law. The relevant statutory provisicns[10] do not grant mobile home owners the "right" to remain in the park "in perpetuity," but rather, simply limit the grounds for eviction to those based on "just cause." Such limitations have generally been upheld by the courts. *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P2d. 894, 900 (1984). *See also Eamiello v. Liberty Sales*, 208 Conn. at 641 ("the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee

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operation of the Escondido Ordinance, may simply reflect the artificially low price of mobile homes caused by excessive rents charged prior to enactment of the ordinance. *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 1357 (1990). *See also Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 54 (1991); *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 649 (1988) ("In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle.")

Even assuming that there was any increased "value" residing in the tenant as a result of the Ordinance, this increase reflects an increase in the value of the "leasehold" which, under California law, is usually considered the property of the tenant, not the landlord. *See Kendall v. Pestana*, 40 Cal. 3d 488 (1985); 4 H. Miller & M. Starr, *Current Law of Cal. Real Estate* 27:92 (1977 & Supp. 1984).

[10] Among other protections and requirements, the California Mobilehome Residency Law prohibits park operators from: (1) terminating tenancies without specified cause; (2) requiring removal of mobile home coaches when tenancies end; and (3) disapproving incoming tenants who purchase mobilehomes, so long as the purchasers are creditworthy and unlikely to violate park rules. Cal. Civ. Code §§ 798.55, 798.73, 798.74 (West 1991).

. . . in respect to mobile home parks is not sufficiently analogous to a physical occupation of property to violate the takings clause.")[11]

Clearly, the state law restricts a mobile home park operator's right to exercise his sole discretion in the selection of his tenants. However, this restriction is not enough to constitute a taking. The type of "taking" necessary to invoke the per-se standard is not one where a "single strand" from the bundle of property rights is taken, but rather, the government action "chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter*, 458 U.S. at 435. That is not the case here because, for the most part, the operator still controls the extent and nature of the possession; most importantly, he retains his primary interest in his land—the right to receive income.

Finally, this Court's decision in *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987), makes clear that the "per-se taking" standard established in *Loretto* is inapplicable to this case. In *Florida Power*, the Court clarified that the element of "required acquiescence" is at the heart of the "physical occupation" that triggers a "per-se taking." The appellees in *Florida Power* contended that it was a taking under *Loretto* for a tenant who was invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. This Court rejected this contention, noting that what made the circumstances in *Florida Power* different from those in *Loretto* was the "invitation." *FCC v. Florida Power*, 480 U.S. at 252.

Similarly, there can be no "per-se taking" in this case, just because the park operator, after inviting a home-

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[11] Indeed, in the recent decision in *Azul Pacifico, Inc. v. City of Los Angeles*, 91 Daily Journal D.A.R. 13599 (9th Cir., Nov. 5, 1991), the Ninth Circuit acknowledged the "apparent" constitutionality of provisions that allow mobile homeowners to sell their homes on site, that require park operators to renew leases, and that "sharply" circumscribe the park operator's ability to terminate leases. *Id.* at 13600.

owner to rent space in his park at a particular rent, receives a lower rent as a result of the Escondido Ordinance, and that same rent is then paid by the subsequent purchaser of the mobile home. The fact that this rent is paid by someone other than the original tenant is of no constitutional significance.[12]

B. The Escondido Ordinance Is Not A Taking Under The Standard Adopted In *Penn Central v. New York*

The California Court of Appeal was correct in rejecting the *Loretto* standard in this case. What is being challenged here is rent control, a form of economic regulation, not a governmental action resulting in a "permanent physical occupation." As this Court noted in *Loretto v. Teleprompter*, economic regulations like the Escondido Ordinance should be analyzed under the multifactor inquiry applicable to "nonpossessory" governmental activity. *Loretto v. Teleprompter*, 458 U.S. at 440.

A takings analysis "necessarily requires a weighing of private and public interests." *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). As this Court has recognized, "government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic

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[12] By alleging that they are being compelled to rent their property to tenants whom they did not choose, the petitioners are essentially claiming that their "right to exclude" has been "taken." A similar argument was made in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). This Court's response in that case, where property was being held out to the public, is equally applicable here, where property is being held out for tenants: the right to exclude others is not "so essential to the use or economic value of their property that the state-authorized limitation of it amounts to a 'taking'." *Id.* at 84. *See also Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.")

exploitation of private property." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

The decision in *Penn Central v. New York* suggested some factors to consider in a multifactor inquiry: "the economic impact of the regulation on the claimant"; "the extent to which the regulation has interfered with distinct investment-backed expectations"; and "the character of the governmental action." 438 U.S. at 124.

In analyzing these factors, it is essential to put the inquiry in the proper context. As this Court noted in the *Penn Central* case:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in the particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole* . . .

Id. at 130-31 (emphasis added).

AARP strongly believes that after weighing and balancing the factors discussed above, this Court will find that the Escondido Ordinance has not resulted in a taking requiring just compensation.[13] The character of the governmental action in this case, and the significance of the problems it attempts to address, outweigh any economic impact on the petitioners.

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[13] AARP agrees with the respondent that the petitioners should be precluded from arguing in this Court that the Ordinance establishes a taking under the *Penn Central* standard. Because the petitioners failed to seek just compensation under available state remedies, an "as applied" taking claim under this standard is plainly unripe. Moreover, because petitioners did not raise or litigate a "facial" claim under the *Penn Central* standard below, they cannot now rely on such a claim as a grounds for reversal. However, AARP analyzes the Escondido Ordinance under the *Penn Central* standard, if the Court decides to consider this argument.

1. *The Escondido Ordinance is a rational approach to remedying imperfections in the mobile home market*

An examination of the "character of the governmental action" is totally missing from the petitioners' brief. They dismiss the Escondido Ordinance with a single conclusion: "the character of the governmental action . . . cuts across the property owner's right to use, possess and dispose of his property." Brief for Petitioners at 18.

Consideration of the public purpose behind the Escondido Ordinance, and of its relationship to the Ordinance, reveals that the Ordinance is the type of governmental action that has consistently been upheld by courts. This Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central v. New York*, 438 U.S. at 125. As the Court noted in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

This same sentiment has been expressed regarding the regulation of landlord-tenant relations and housing conditions: this Court has "consistently affirmed that States have *broad* power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter*, 458 U.S. at 440 (emphasis added); *Pennell v. San Jose*, 485 U.S. at 11-12.

The Escondido Ordinance is representative of the type of reasonable responses that state and local governments have taken to remedy the imbalance in the relationship of landlords (mobile home park operators) and tenants

(mobile homeowners) in the mobile home market and, thereby, ensure the availability of this affordable type of home ownership.

For millions of Americans with limited resources, many of whom are older citizens,[14] "mobile homes", with a median purchase price of approximately $15,000,[15] are one of the few remaining sources of affordable home ownership.[16]

The term "mobile home" is a misnomer, since most of these homes make only one trip—from the factory or showroom to the installation site.[17] Mobile homeowners are not "tenants" who can just pack their bags and leave when a dispute arises with a park operator. Once installed, these homes cost an estimated $10,000 to $15,000

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[14] As noted *supra* note 3, older residents of mobile homes tend to have limited financial resources. This is true even when compared to other mobile home residents. The median income of older mobile home households (age 65 and older) was $11,556 in 1989—58% less than the median national income ($27,735) and 38% less than the median income of younger (less than 65 years old) mobile home residents ($18,758) *1989 American Housing Survey, supra* note 1, 324 (Table 7-12), 58 (Table 2-12).

[15] *1989 American Housing Survey, supra* note 1, at 342 (Table 7-14). The median value of a mobile home is $18,563. *Id.*

[16] In his 1970 message to Congress on national housing goals, President Nixon acknowledged that "for many moderate-income American families, the mobile home is the only kind of housing they can reasonably afford." *Message from the President of the United States Transmitting the Second Annual Report on National Housing Goals*, Committee on Banking and Currency (April 1, 1971). *See also Report on the President's Commission on Housing* 85-86 (1982).

[17] The fact that, today, mobile homes are designed to be permanent structures has led the industry and the government (the Department of Housing and Urban Development) to refer to this type of dwelling as "manufactured" housing.

to move, and the homes can suffer serious damage in the moving process.[18]

Over half of all mobile homeowners (54%) rent the sites on which their homes are installed.[19] A severe shortage of rental sites in many communities, created by restrictive zoning, combined with the immobility of "mobile" homes, gives park operators extraordinary leverage to exact large increases in rents and other fees. According to a 1987 survey, mobile home park rents increased from an average of $93 per month in 1981, to $121 in 1984 and $138 per month in 1987. Seventeen percent of park residents in the same survey reported paying $200 or more in rent per month, up from ten percent reporting in a similar 1984 survey.[20] In Florida, for example, from 1986 to 1991, apartment rents rose 15 percent, the Consumer Price Index (CPI) moved up 23 percent and commercial rents declined, while mobile home park rents increased 62 percent.[21]

The Maryland Court of Appeals discussed the situation in the mobile home market more than a decade ago, when it upheld that state's mobile home law against a takings challenge:

> Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks. Thus, the mobile home owner is compelled to rent space from the park owners who, because of the limited ability of space and the high cost of relocation, are able to dictate unfavorable rental terms and conditions.

Cider Barrel Mobile Home Court v. Eader, 287 Md. 571, 574 (1980).

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[18] *Shifting the Balance, supra* note 1, at i.

[19] *Id.*

[20] *Id.*

[21] Kullman, *David vs. Goliath*, FMO News 4 (March 1991).

In addition to escalating rents, many mobile home residents have been victimized by a variety of unfair practices that arise from the unique combination of home ownership and site tenancy. These include tie-ins between home sales and park rentals, unfair restrictions on the sale or transfer of the home or tenancy, evictions without good cause, excessive and unreasonable fees, unreasonable park rules and regulations, harassment of tenant organizations and retaliatory evictions, as well as failure to maintain parks.[22]

In order to protect tenants, some 32 states have enacted specialized legislation regulating mobile home park tenancies. California, Florida, and New York have enacted extensive laws that include provisions that prohibit tie-ins between the sale of homes and the renting of park sites as well as entrance and exit fees, provide a warrant of habitability requiring the park operator to maintain the park in a habitable condition, and give residents a right of first refusal, providing an opportunity for them to purchase the park before it is sold to another party. Additionally, requirements for long-term leases consider the homeowner's investment in installing a home.

In upholding its state's mobile home statute, the Connecticut Supreme Court in the *Eamiello* case recognized the unique nature of a mobile home tenancy and the investment made by mobile home owners. It found that the statutory provision prohibiting a mobile home park operator from restricting the homeowner's right to sell "protects tenants at mobile home parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase more expensive housing." *Eamiello v. Liberty Sales*, 208 Conn. at 648.

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[22] *Shifting the Balance, supra* note 1, at ii.

The issue of rent control for mobile home tenancies is one that has generally been addressed at the local level.[23] Like many other communities in California and across the country, Escondido began to struggle in the early 1980's with how best to respond to escalating rents for mobile home spaces. After a series of attempted accords, propositions, and hearings throughout the decade, the city ratified the Ordinance in question in June 1988.

The "modified rent stabilization" approach followed in the Ordinance "offers relief for current renters without harsh constraints on the park owners," provides a "reasonable return on investment for the park owners," and allows "reasonable rent increases based on certain criteria." [24]

In addition to Escondido, numerous other communities in California, as well as those in other states, have enacted rent control ordinances for mobile home tenancies,[25] many of which include vacancy control provisions.

2. *The economic impact of the Escondido Ordinance is not severe*

As one commentator has noted, to find a taking under the *Penn Central* test, this Court has "made it clear that the economic or other interference must be nearly total." [26] Similarly, the Ninth Circuit in *Hall v. City of*

[23] At least one state statute addresses rental rates. *See* Fla. Stat. Ann. § 723.033 (West Supp. 1991) (law prohibits "unconscionable" rent increases).

[24] D. Thurston, An Issue Paper on Rent Stabilization for Mobile Home Parks (Oct. 15, 1986).

[25] According to one source, over 75 communities in California had mobile home space rent controls in 1988. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 406-407 (1988).

[26] Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 958 & n.190 (1989).

Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), in discussing the *Penn Central* case, noted that economic regulation cases can withstand drastic diminution in the value and usefulness of property. *Hall v. Santa Barbara*, 833 F.2d at 1275. The economic impact alleged by the petitioners in this case could not reasonably be characterized as "drastic" or "nearly total."

Moreover, it is incorrect for the petitioner to quantify the "economic impact" of the Ordinance in terms of the premium received by a homeowner on the sale of his mobile home in a rent-controlled park.[27] One commentator correctly suggests that "courts ought to focus on the property owner's loss rather than the occupier's gain." [28] The petitioners' loss is speculative, at best. As the Third Circuit acknowledged in *Pinewood Estates of Michigan v. Barnegat Township*, 898 F.2d 347 (3rd Cir. 1990), it could be argued that the mobile home park operators might, in fact, receive the same rents they are currently receiving in the absence of vacancy control. *Id.* at 353, n.10.

3. *The Escondido Ordinance does not seriously interfere with distinct investment-backed expectations*

The petitioners clearly expected to obtain a greater "profit" from their mobile home parks than they are currently receiving. This, however, is not the type of ex-

[27] AARP maintains, as discussed above, that the allegedly taken property rights—measured as this "premium" and/or any "additional rents"—never belonged to the petitioners in the first place. As this Court noted in the *Penn Central* case, while governmental action may cause economic harm, a taking will not be found where that action has not interfered with a property interest. *Penn Central v. New York*, 438 U.S. at 124-25.

[28] Manheim, *supra* note 26, at 1012 and n.523. Manheim notes that this parallels the analysis in condemnation proceedings.

pectation that the courts should recognize in a takings analysis. The fact that the most profitable use of property is prevented is not dispositive. *Andrus v. Allard*, 444 U.S. 51, 66.

Through operation of the Ordinance, the petitioners are still able to rent their property and receive an income from it; their expectancy of rental use has not been fundamentally disturbed and remains economically viable. Petitioners continue to receive a fair return on their investment. This is all that they are entitled to receive under the law. *See Pennell v. San Jose*, 485 U.S. at 13. If the park owners do not believe that they are receiving a fair return then, just as many other park operators have already done, they can petition the Escondido Mobilehome Park Rental Review Board to obtain a rent increase.

It is clear from the foregoing discussion that the Escondido Ordinance is an important, rational, and constitutional exercise of the city's police power, which "strikes a reasonably fair balance between the economic interest of mobile home tenants and those of mobile home park operators." *Eamiello v. Liberty Sales*, 208 Conn. at 649-650. Therefore, in balancing the nature of the Ordinance against the other factors of the *Penn Central* standard, this Court should determine that no takings claim can be made.

II. THE ESCONDIDO ORDINANCE SUBSTANTIALLY ADVANCES LEGITIMATE STATE INTERESTS AND DOES NOT DENY PETITIONERS ECONOMICALLY VIABLE USE OF THEIR LAND

The petitioners suggest that the Escondido Ordinance should be analyzed under the stricter standard for takings analyses outlined by the Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). We agree with the California Court of Appeal, which questioned the applicability of *Nollan*'s "heightened scrutiny"

to rent control provisions. *See Casella v. Morgan Hill*, 230 Cal. App. 3d at 56.

AARP maintains that, if a stricter scrutiny approach is adopted, then it should be limited to land use cases like *Nollan*. If, however, the Court chooses to apply the *Nollan* standard to this case, then the Escondido Ordinance would be able to satisfy this test.

The petitioners contend that the Escondido Ordinance does not substantially advance a legitimate state purpose but, rather, "simply enriche[s] those residents who were in place when the voters enacted rent control." Brief for Petitioners at i. AARP rejects this narrow characterization of the Ordinance's purposes. *See Miller v. Schoene*, 276 U.S. 272, 279 (1928) (that certain private interest may benefit from the restrictions placed upon the property of others does not establish that those restrictions are not in the public interest); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-244 (1984) (the fact that the immediate beneficiaries of a governmental action may be individual tenants "does not condemn it as having only a private purpose.")

Clearly, the Escondido Ordinance, in particular its vacancy control provision, protects existing mobile home owners. If there was no vacancy control, then the park operator could threaten to raise rents so high as to significantly depress the value of mobile homes in his park.

Moreover, the vacancy control provision can be considered to be a type of eviction protection. Without vacancy control, a landlord has the incentive to harass the existing tenant to the point of forcing the tenant to move out so that the landlord can increase the rent. In *Pennell v. San Jose*, this Court recognized as a legitimate purpose of a rent control statute reduction of "the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford. Particularly during a housing shortage, costs of the disloca-

tion of low-income tenants can be severe." 485 U.S. at 14, n.8. *See also Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 (9th Cir. 1991) (eviction controls have been upheld to protect "tenants from the high cost of dislocation in a tight housing market, and prevent landlords from arbitrarily evicting tenants simply to obtain higher rents from new tenants.") The threat of eviction is particularly acute for mobile home owners who face the prospect of literally moving their homes at great expense and potential for costly damage.

Of course, vacancy control also protects the purchasers of the mobile homes located in the parks from exorbitant rents. A recent survey reveals that in mobile home parks where there is no vacancy control, rents increased between 50-100 percent upon the sale of the mobile home.[29]

While the Escondido Ordinance "substantially advances" the above-stated purposes, the petitioners are still able to rent their property and receive income from it. As discussed above, their use of the property remains economically viable.

If the Court chooses to apply the stricter *Nollan* standard to this case, then the decision in *Azul Pacifico v. Los Angeles* is instructive. In a challenge to that city's vacancy control provision, the Ninth Circuit acknowledged that it "cannot say that [the vacancy control provision] is unconstitutional" where the vacancy control provision serves the purpose of "protecting existing tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." The court went on to note that this rationale "falls within the traditional police power and thus there is a sufficient nexus between the challenged provision and a legitimate

[29] Golden State Mobile Home Owners League, *Mobilehome Parks with Large Rent Increases for Mobilehome Pads upon Changes of Ownership of Mobilehomes* (1990).

justification." *Azul* at 13602. AARP believes that the same conclusion should be reached in this case.

III. THE ESCONDIDO ORDINANCE IS A REASONABLE MEANS TO ACHIEVE THE STATED GOALS OF THE CITY AND THEREFORE DOES NOT VIOLATE THE PETITIONERS' RIGHT TO DUE PROCESS OF LAW

This Court has long held that due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means shall have a real and substantial relationship to the objective sought to be obtained." *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934).

As this Court recently reaffirmed in *Pennell v. San Jose*, price control, including rent control, is unconstitutional under the Due Process Clause of the Fourteenth Amendment if it is "arbitrary, discriminatory, or *demonstrably irrelevant* to the policy the legislature is free to adopt." 485 U.S. at 11 (emphasis added and citations omitted). Similarly, California courts have upheld controls in the landlord-tenant area as legitimate exercises om the police power, if they are "reasonably calculated to eliminate excessive rents." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 165 (1976).

There is no real dispute regarding the legitimacy of the public purpose behind rent control. As this Court said in the *Pennell* case, "[a] legitimate and rational goal of price or rate regulation is the protection of consumer welfare" and "a primary purpose of rent control is protection of tenants." 485 U.S. at 13.

The disagreement, however, focuses on the relationship between this valid purpose and the Ordinance. It is important to remember that the fundamental question in a substantive due process analysis is not the wisdom of the Ordinance, but rather, its reasonableness. What this Court

said regarding the San Jose rent control ordinance challenged in the *Pennell* case is equally true here: the Escondido Ordinance "represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell v. San Jose*, 485 U.S. at 13.

Faced with a substantive due process challenge of a mobile home control ordinance, the Ninth Circuit in *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9tn Cir. 1991), had no problem finding it to be constitutional. Noting that the plaintiff has a "heavy burden" to show that "*no* rational relationship exists between the vacancy control provision and the purpose of the ordinance," *id.* at 958 (emphasis added), the court in *Sierra* held that "[a]lthough it may be true that the ordinance in some cases takes money from the landlord and puts it into the pocket of a tenant who no longer resides at the park, the City Council could reasonably believe that in the majority of cases the ordinance serves the valid public purpose of keeping mobile home rent from becoming prohibitively high." *Id.*

The court in *Sierra* went on to note that "[h]ow well the ordinance serves this purpose is a legislative question, one the court will not consider." *Id. See also Casella v. Morgan Hill*, 230 Cal. App. 3d at 57; *Birkenfeld v. Berkeley*, 17 Cal. 3d at 159; *Schnuck v. Santa Monica*, 935 F.2d at 175 ("that rent control may unduly disadvantage others, or that it may exert adverse long-term effects on the housing market, are matters for political argument and resolution; they do not affect the constitutionality of the Rent Control Law."). The City Council and citizens of Escondido should be granted the same deference in this case.

CONCLUSION

In sum, the California Court of Appeal decision is the only outcome that preserves the legitimate authority of states and localities to reasonably balance the interests of mobile home owners and mobile home park operators in an attempt to remedy imperfections in the mobile home market.

For the foregoing reasons, the American Association of Retired Persons respectfully requests this Court to affirm the decision of the California Court of Appeal.

Respectfully submitted,

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